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## ARTICLE



# Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition

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## Abstract

Transitional justice studies increasingly apply to processes of truth, restoration and accountability in contexts far removed from the paradigmatic transitions from authoritarianism or war to relatively liberal democracy on which the field was initially based. At a time when transitional justice is being evaluated with greater stringency, it is worrying that assessments of its worth might be unduly coloured by reliance on non-transitional circumstances of established democracies or ongoing conflicts or authoritarianism. A systematic empirical understanding of the value of transitional justice is skewed when undue weight is given to mechanisms applied in favourable contexts. This may be where political or economic circumstances are so advanced that the mechanisms have little causal significance to an ongoing process of political, civil and (possibly) economic reform, or in contexts too inimical to anything approaching a liberalising or peace-building conclusion (e.g. when it takes place while war is ongoing or within an authoritarian regime). The article accepts that transitional justice mechanisms can be used to improve conditions under authoritarianism or war and can augment the rule of law, development and human rights in states that are already committed to liberal democracy. However, its impact in these non-paradigmatic circumstances will be limited because of the weakness of the state's commitment to improving societal conditions in the former and the pre-existing strength of the commitment in the latter. It argues that there is a distinction between transitional justice and the use of transitional justice mechanisms.



## Keywords

transitional justice, war, authoritarianism, transition, trial, truth commission

## INTRODUCTION

Transitional justice (TJ) can be defined as the “full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.<sup>1</sup> These may include both judicial and non-judicial mechanisms [...] individual prosecutions, reparations, truth-seeking, institutional

reform, vetting and dismissals, or a combination thereof” (UN Secretary-General, 2004.) From this definition, the ‘justice’ element is clear in terms of the crimes to which it is directed (mass repression, civil war, genocide etc., though there is increasing emphasis on socio-economic and gender-based crimes), while the mechanisms used have become commonplace (trials, truth commissions, purges, restorative local justice mechanisms, etc). Over time, the concept of TJ has been reframed in an expanding

<sup>1</sup> The author is grateful for the reviewer's comments which helped considerably in tightening up the argument.



literature (Teitel, 2003; Roht-Arriaza, 2006; Bell, 2009) to include agendas that were disregarded in its earliest days, most notably restorative justice, which followed the recognition that intimate violence may require intimate forms of justice, and that community-level conflict requires community-level solutions (Gready, 2005, p. 14). As applied concepts of justice expand, TJ has become a complex of inquiries incorporating development studies, economics, semiotics, anthropology, political science and many other disciplines. The debate has shifted from one centred on competing institutions to a holistic approach incorporating diverse mechanisms and values without a clear normative hierarchy. This diversification has been in response to the variety of contexts where human rights, broadly understood, have been denied and replaced by the supposedly one-size-fits-all approaches that marked the truth versus justice era of the 1990s.

The expansion of the conception of justice, while commendable, has placed some strain on the conception of what is 'transitional'. This element of the field has always been somewhat elusive, its very liminality making it adverse to precise definition. The scope of TJ has always been contested spatially in terms of geographical area and type of injustice. As the mechanisms and contexts it applies to proliferate, it is also contested temporally, to the degree that to label certain processes 'transitional' risks conceptual incoherence. The focus on crimes of the past opens up the possibility of retrospective accountability in the democratic future far beyond a point which can truly be said to be transitional or, at the other end of the spectrum, immediate accountability for crimes of the past before a transition is reached or even in view. Of course, one can argue that this is merely a semantic point and that 'transitional justice' has perhaps outgrown its composite words and no longer simply refers to justice during transition, but rather to processes aimed at dealing with the past generally. Terminological inconsistency, it might be argued, should not concern us if the concept of TJ provides a platform and rallying point for positive action in redressing past injustices of all types, and can be adjusted to cope with the infinite variation of transitional exigencies. That the expansion of TJ has occurred in response to pressing necessities and blind spots is beyond question. However, at a time when scholars, activists and (perhaps most importantly) funding agencies increasingly question whether TJ can actually justify claims of being able to satisfy those necessities, there may be some advantage in re-examining the elasticity in the conception of transition catalysed by the wider scope of justice.

After a period of rapid growth, scholars are now attempting to systematise what has been published about the causal relationships between TJ and its overarching aspirations (peace, democracy, socio-economic justice, human rights, rule of law) and the micro-goals which contribute to them (retribution, restoration, redistribution, deter-

rence, reconciliation, social pedagogy). The literature has been dominated by anecdote, analogy and hypothesis, and it is assumed that more solid empirical research will be able to substantiate claims of how well TJ can achieve the ambitions ascribed to it (Kritz, 2009, p. 16; Olsen, Payne & Reiter, 2010, p. 4). However, as Lutz (2006, p. 339) notes, there are so many independent variables in a transition process that it is hard to isolate the role of accountability or restorative justice measures. The nature of the transition itself differs. This is in terms of the old regime or conflict (authoritarian, civil war, authoritarian civil war, democratic civil war, a regime of criminals or a criminal regime, secession or ethnic conflict,) and the new regime (strongly democratic, weakly democratic, pseudo-democratic, participation or exclusion of old regime). It also depends on the way transition arrived (negotiation, victory); the scale and duration of past crimes (number of victims, years of war/repression); the history of the state (autocracy and war are anomalous or commonplace); the autonomy of law; and political economy (institutions of governance, political environment, and economic wealth and distribution). It matters significantly what a given transition is *from* as well as what it is *to*, when the time comes to evaluate TJ.

It is important, therefore, to clarify which types of TJ mechanisms can have the biggest impact on and for which it has little hope of success, given the numerous variables a change in political regime incorporates. Simply put, a systematic empirical understanding of the value of TJ is skewed when undue weight is given to processes applied in two different contexts. This may be when the situation is too favourable to a positive outcome, for example, while accountability that occurs long after successful political transition is much easier it is also less likely to have a significant bearing on the direction of the state. Alternatively, the situation may be too inimical to anything approaching a liberalising or peace-building conclusion, such as when TJ mechanisms are applied while war is ongoing or within an authoritarian regime. This article questions whether a process should be called TJ or judged as such simply because it aims to deal with the past generally, to draw a line though what may be distant history, or pursue a peace which has no prospect of emerging. It criticises the persistent and increasing emphasis in studies on the use of TJ mechanisms in societies which radically depart from the traditional type of transitions where it is most useful.

There is an easily recognisable, but frequently ignored, distinction between TJ and the use of what are generally regarded as the mechanisms. While this article accepts that TJ mechanisms can be used to improve conditions during authoritarianism or war, the overall impact of TJ in these non-paradigmatic circumstances will be limited because of the weakness of the state's commitment to human rights and the rule of law in the former, and the pre-existing strength of the commitment in the latter. What may be left in these non-paradigmatic transitions are a series of discrete micro-



projects which are so far removed from, and causally insignificant in, any macro process of changing from one type of society to another, that to label them 'transitional' is both contrived and unhelpful in wider debates on the phenomenon. This is not to say that they are not beneficial to their target communities. However, it has become too easy for critics to undermine TJ as a whole by pointing to the relatively paltry nature of the output of projects in contexts where there are no other national processes of large-scale socio-political transformation. Similarly, it is too easy for advocates to justify TJ generally with reference to projects which blossom in states where already consolidated peace and democracy are highly propitious for any type of social project. In merely augmenting an existent regime rule of law and human rights, the incorporation of TJ at the tail end of a narrative of success signals socio-political advances made elsewhere rather than its inherent utility. Somewhere in-between is the battleground on which the debate on the general usability of TJ should occur, between its advocates and detractors. This territory is the paradigmatic transition.

Part I outlines what we consider the paradigmatic transition, part II examines the application of TJ to contexts far removed from these conditions, and part III outlines why the success or failure in mediating paradigmatic transition is the most pertinent factor in judging the worth of transitional accountability.

## PART I: THE PARADIGMATIC TRANSITION

Transition defies comprehensive definition. While the word connotes change, and within the present context clearly connotes political transformation, change is endemic in politics: resisting it, debating it or contesting the degree of change needed (Du Bois and Czarnota, 1999, p. 9). Transition can be negative, for example the pluralist republics of the former Yugoslavia becoming ethnically exclusionary entities or Haiti's recurrent shifts from democracy to anarchy. Roht-Arriaza (2002, p. 1) has argued that the term 'transitional' has always been slippery because TJ debates have never clearly articulated what the state is transitioning to. She may overstate the case - the initial conception of transition in TJ was one which emerged from political science studies of the Southern Cone, such as that of O'Donnell and Schmitter (1986) who focussed on elite models of transition which brings agency and choice to the foreground. Here, transition was conceived as the interval between two regimes without necessarily incorporating a normative democratic direction. This in itself is quite a broad and mutable concept. Eventually, definitions of transition adopted in the literature adapted this paradigm to concentrate on transition of a regime to democratic, peaceful, rights-respecting polities. For example, Henkin

(1989, p. 1) argued that discussions on TJ arise "when a government that has engaged in gross violations of human rights is succeeded by a regime more inclined to respect those rights." Teitel used the term transition to cover "the move from less to more democratic regimes" (Teitel, 2000, p. 5), while Smiley considered transition from a regime whose norms are bad to one whose norms are good (Smiley, 2001, p. 1336). Over time, the link to liberal democratic transition was questioned. For example, Lundy and McGovern (2008, p. 273) remind us that the assumed virtue of Western formulations of democracy can mask the fact that human rights abuses may continue in states where the norms of liberal democratic accountability prevail. Similarly, Nagy criticises the preoccupation with bringing illiberal regimes into the liberal scheme as this treats liberal democracies as benevolent models (Nagy, 2008). Admittedly, even a reasonably conception of democracy is but the tip of the democratic iceberg and can obscure any number of dangerous contingencies below the water line. However, the focus on transition to liberal democracy in the literature may be explained by its greater capacity to rectify such problems than competing constitutional models.

Though there is a considerable degree of flexibility in such definitions, the paradigmatic transition was generally framed by two modes of transition, compact (understood as negotiated compromises between antagonists) or rupture (understood as the overthrow or defeat of one side to a political or military conflict) (Ní Aoláin and Campbell, 2005, p. 180).

Two types of paradigmatic transition fit within this concept. The first, typical of the Latin American and Eastern European transitions which spurred the development of TJ as a self-conscious policy-making process in the late 1980s, is that of a non-democratic or authoritarian state moving to democracy. This type of transition has seen a recent revival with elective regime change in Tunisia, while, at the time of writing, it is unclear whether or to what degree Egypt will follow. While truth commissions and modern instantiations of the successor trial initially dealt with the problem of the legacy of authoritarian rule, a second paradigmatic transition became more common as the 1990s progressed from the wars in the Balkans and Great Lakes region to more recent transitions as in Cote d'Ivoire (and possibly Libya). Here, a state transitions from war or a prolonged period of structured political violence to a peace which reaffirms, modifies or creates democratic governance. Many changes will of course contain elements of the two paradigms. Most peace agreements provide for renewed or modified democratic measures, while most transitions from authoritarianism to democracy attempt to place controls on military or non-military actors who could threaten violent conflict.

Definitions of TJ that adopted this model, such as Teitel's (2003, p. 69) interpretation of it as "the concep-





tion of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes”, have fallen out of favour. Roht-Arriaza (2006, p. 1) argued that this definition is “problematic” in that it implies a defined period of flux after which a post-transitional state sets in, whereas in practice transition might span decades. This argument appears to have been accepted uncritically in the literature, but it should be questioned. There are periods when a state of war, autocracy or repression is on the wane or when the end may look inevitable, and there may be periods in democratisation where liberalising programmes have been consolidated but not finalised. However, to conceive of these as transitional requires degrees of mental deftness that conceptualise transition so elastically as to deny it any independent value. Transitions are still politically defined by pacts, agreements, elections, referenda, constitutions, and peace treaties. It may take decades of weakening in a war or autocracy to reach this point, or decades afterwards for the new polity to become fully consolidated, but it strains credibility to describe all of that period as genuinely transitional. The transition itself is a finite and contained phenomenon, with temporal limits at the undemocratic and democratic ends of the interregnum between regimes (indeed, much of the debate concerns how residual power of the old elite constrains what can be done). But, perhaps paradoxically, the field of what we call TJ has become divorced from these moorings and appears to have no limits to its field of application.

The term ‘transition’ is now routinely applied to contexts where no such process is apparent. It is something conceived of as a natural and inevitable development in a globalised, “steady-state” phase of TJ, departing from the preoccupation with past violence to treat conditions of persistent conflict, laying the foundation for a normalised law of violence where TJ has become commonplace as opposed to exceptional (Teitel, 2003, p. 89-93). It is worth pondering how natural and coherent this development is; it may owe more to the popularity of TJ as fashionable vocabulary for funding applications and academic attention than to any coherent correspondence between available human or institutional resources and a socio-political context. Given the boundless pliability of inherently ad hoc mechanisms like special tribunals, truth commissions, commissions of inquiry or lustration committees, it should come as no surprise that they have been employed in human rights work in many different types of societies beyond the merely transitional. Another explanation for the use of TJ mechanisms in non-paradigmatic transitions is the laudable desire to include gender and structural issues, hitherto ignored due to the concentration in the 1980s and 90s on liberal legalist issues in paradigmatic transitions (Mani, 2007, p. 151). However, this has gone a step further to the extent that mechanisms are now being used in states in the developing

world where there has been little or no discernible political change or increased domestic willingness to tackle these issues, attempting to initiate an economic transition instead of capitalising on a political one. There can be little doubt that TJ mechanisms are potentially of great use in human rights and developmental work such as justice issues. If any TJ mechanism improves human rights, broadly understood, making society fairer or more tolerant, it is to be welcomed. However, it is highly questionable whether it is in any way coherent or sensible to consider every truth commission, trial or purge as inherently transitional, if the state in which they occur has undergone no significant change, unless one accepts the bland assertion that “every society is in transition” (Kiss, 2000, p. 92). What makes TJ distinctive is not the value of its aims, but the fact that it occurs in times of heightened, epiphenomenal opportunity when a state is re-evaluating or re-establishing the norms on which it is based. The significance of this essential liminality is being lost in an era where a “do everything, engage everyone” (Gready, 2005, p. 7) ethos is paramount.

In much TJ discourse, therefore, a highly tractable definition of ‘transitional justice’ now includes accountability before a peace agreement is finalised (or even mooted): processes in long-established Western democracies to address historic injustices against marginalised groups, processes in non-democratic states where there is no regime change and mechanisms adopted when there is a significant change from one civil democratic government to another. As Bell (2009, p. 23) notes, “little attempt has been made to define a concept of transition that would place limitations on when transitional justice can legitimately be applied.” TJ no longer appears to require an observable period of liberalising political change. This is troubling as the discipline reaches maturity and attempts are made to undertake more systematic and comparative analysis of its record in order to move away from the faith-based discussions which have dominated the debate to more measured, fact-based ones (Thoms, Ron and Paris, 2010, p. 329). As Schauer (2003, pp. 12-13) points out, “there is always a risk that, by defining the problem [of transition] so broadly, we lose a crisp sense of what the problem is and where it has its most significant bite.” It is necessary therefore to clarify the types of transition in which TJ mechanisms are employed. It should be borne in mind that they may be used in contexts whose dilemmas (if indeed there are any) are radically different in material terms from the type of situations addressed in earlier debates, such as the peace-versus-justice or truth-versus-trial issues which dominated the topic in earlier times.

First, however, it is necessary to look at the application of TJ mechanisms in four areas that depart from the democratic/post-conflict transition paradigm, namely TJ in mature democracies and in civil-civil transitions at the more permissive end of the spectrum, and in authoritarian regimes and ongoing conflicts at the more restrictive end.



## PART II: A TYPOLOGY OF QUASI-TRANSITIONAL JUSTICE

### a) Transitional Justice in Mature Democracies

TJ mechanisms have ceased to be applied solely to post-authoritarian regimes or post-conflict situations. Truth commissions, restoration projects, historical inquiries and trials are increasingly employed in mature democracies attempting to repair instances of past abrogation of the universalistic ideas on which they claim legitimacy (Torpey, 2003, p. 9). These are used long after the democracy has been established and consolidated, but are nevertheless referred to as instances of TJ. For example, the German government has apologised and paid money to Namibians for the Herero genocide in the first decade of the last century (Huyse, 2009, p. 34). In the United States, the Greensboro Truth Commission and reparations processes for Japanese-American internees are further instances of historical justice viewed through the transition lens (Olsen, Payne & Reiter, 2010, p. 2). The International Center for Transitional Justice (2008, p. 1) reports on the settlement package awarded by the Canadian Government to the estimated 80,000 survivors of the indigenous children forcibly assimilated in church-run Indian Residential Schools and the Truth and Reconciliation Commission whose mandate was to investigate it.

These processes do valuable work and constitute an appropriate response to earlier arguments that a better understanding of reparation politics would consider crimes committed by liberal regimes as well as authoritarian ones. Responding to the treatment of aborigines (Ratner, Carroll and Woolford, 2003), damage the slave trade did to Africa (Conley, 2003) or restitution of art stolen by the Nazis (O'Donnell, 2011) may be what Olick and Coughlin (2003, pp. 49-50) call "responsible politics of regret" or what De Brito et al (2001, p. 1) call "the politics of memory". However, these situations are far removed from that of a paradigmatic transition. The TJ mechanisms, designed for post-authoritarian and post-conflict situations, perform the standard functions of legitimisation and national reconciliation because they enjoy the full weight of an industrialised liberal state and there are decades between the wrongdoing and the application of TJ. The problems they face, however, are less intractable, and the political context less volatile, than the transitions that characterised the field in the rush of post Cold-War democratisation and the wars of the 1990s. Dramatic failure, or indeed complete success, of these processes will have almost no bearing on the functioning of domestic polity.

### b) Transitional Justice in Civil-Civil Transitions

A notable recent development is the extension of TJ to instances of quasi-transition from a civil government where human rights violations occurred to another where this is less likely to occur. Prime examples include the change in Mexico, in 2000, from decades of PRI hegemony to greater political openness (Seils, 2004) and the civil-civil transition in Nigeria in 2007 (Yusuf, 2010, p. 92). These are analogous to transitions in long-established 'conflicted democracies' which experience prolonged political violence from deep-seated societal division, the paradigmatic example being Northern Ireland. While only South Africa has attracted more TJ studies than Northern Ireland, Ní Aoláin and Campbell note that the imperative in such societies is to reform rather than transform, although the typology will depend on how far the state was compromised during the violence and how far it has gone to acknowledge it (Ní Aoláin and Campbell, 2005, p. 187). These quasi-transitions are radically different from the paradigmatic transition from which the field emerged: given that there is usually significant public acceptance of the government and the rule of law, human rights abuses are considered exceptional long before political change and there is little incentive to further dismantle or reconstruct the state (Ní Aoláin and Campbell, 2005, p. 188). Again, the problems faced are less intractable, and the political context less volatile, than in the paradigmatic transition, begging the questions of whether they are reforming or transitioning, and whether it is worthwhile maintaining a distinction between the two.

### c) Transitional Justice in Ongoing Conflicts

As noted above, one of the two paradigmatic transitions in the literature are state transitions from war or from a prolonged period of mass, organised political violence to peace. There is no problem in applying the paradigm in cases like Sierra Leone's Special Court, Kosovo's Regulation 64 Panels and East Timor's Special Panels, which were established after the guns went silent, and likewise to ongoing or mooted Arab trials of figures from the Gaddafi, Ben Ali and Mubarak regimes *after* their removal. However, the first and probably most examined instance of this TJ genus, the International Criminal Tribunal for the former Yugoslavia (ICTY), was established when there was no transition to speak of. Established in May 1993, the Tribunal preceded the Dayton accords which established the Office of the High Representative for Bosnia-Herzegovina, by three-and-a-half years and the removal of Milosevic from power by six (UN Security Council 1993). Teitel (2005a, p. 291) notes that, after the Cold War era, TJ institutions were



not necessarily developed in the aftermath of conflicts alone, but as part of a process of resolving ongoing conflicts. However, this position elides the extent to which accountability to the ICTY jeopardised the resolution of the conflict at Dayton (Mégret 2002, p. 1278), proved ineffective in preventing the later Kosovo war and boosted the electoral prospects of revanchist candidates (Sloan, 2007, p. 88; Subotic, 2007, pp. 370, esp. footnote 35). On a similar line, the International Criminal Court (ICC) Chief Prosecutor Luis Moreno-Ocampo (2007, pp. 8-9) argues that:

“The International Criminal Court is part of the transitional justice project because it aims to confront centuries-old methods of behaviour – those of conflict and war, the abuse of civilians, woman and children – and to reshape the norms of human conduct while violence is still ongoing, thus aiming, as stated in the Rome Statute, to contribute to the prevention of future crimes.”

However, if one looks at where the ICC is active, most notably Sudan and Libya, at the time he commenced his activities there was no certainty of transition or even a peace agreement. Many argue that the investigations in Uganda are hampering peace (Apuuli, 2006; Branch, 2007), but the very existence of a debate demonstrates how far the state is from anything resembling peace or transition. The failure of the Bashir indictment and the death threats against witnesses in DRC proceedings demonstrate (Kerr and Mobekk, 2007, p. 120) that these processes face even more problems than the paradigmatic transition, as they lack the opportunity for accountability that the victor's justice or a solid peace-settlement would allow (Teitel, 2005b, p. 858). Certainly, the gathering of documentation and evidence can and should start before the end of violence. However, given the possibility that a Bashir, Gaddafi or a Kony might have ultimately emerged victorious at the time of indictment, it strains credibility and consistency to describe these activities as in any way transitional.

Much like the use of truth commissions and historical justice in mature democracies combine TJ with politics of regret, the use of TJ mechanisms in ongoing conflicts (at least to the extent that it is intended to help resolve the conflict) is better characterised as a type of conflict transformation. Conflict transformation is a “process of engaging with and transforming the relationships, interests, discourses and, if necessary, the very constitution of society that supports the continuation of violent conflict” (Miall, 2004, p. 4). It involves transforming the relationships that support violence, implicitly acknowledging the violence is potentially long-term instead of presupposing its termination (Fischer, Giessmann and Schmelze, 2004; Lederach, 2003). This fits better with the potential for a tribunal like the ICTY to stigmatise and physically contain antagonists

(Akhavan, 2009) while avoiding the theoretic artfulness inherent in perceiving these actions as transitional. The position of amnesty in peace agreements or pacts has long been debated in TJ, but pre-peace talk amnesties introduced before such agreements, to reduce the number of combatants in a conflict transformation or to bring parties to the negotiating table at the end of authoritarian rule in Uruguay, Brazil and South Africa, have long been accepted as the “carrot” in conflict transformation. Trials and truth commissions before peace (or even the prospect of peace) are better seen as a conflict transformation “stick” than using tortured (and possible illusory) logic to label it transitional. Similarly, in Columbia, the 2005 *Ley de Justicia y Paz* proposed effective amnesty for the right-wing paramilitary group United Self-Defence Forces for beginning, as opposed to concluding, a peace process. It has been challenged by human rights commentators and politicians who rejected President Uribe's presentation of legislation as restorative TJ (Díaz, 2008). By linking demobilisation to pardon and reduced prison sentences, it is a clear instance of attempted conflict transformation in a situation where meaningful political change is as far away as ever. TJ is a form of peacebuilding in transition, not a form of peace-making long before it.

## d) Transitional Justice in Authoritarian Regimes

In the early days of TJ discourse, Cohen (1995, p. 41) argued that the “forget the past” rhetoric used by the old regime when handing over power to liberalising agents constituted “an attempt to avoid accountability by using liberal slogans in bad faith.” The last twenty years have also seen regimes tactically adopt the liberal antithesis of “forget the past”, namely TJ, in situations (a) where the transition is from one form of authoritarianism to another, and (b) where there is no transition but an authoritarian regime adopts mechanisms of TJ without simultaneously undergoing a process of political reform. Regarding the former category, a prime example is the truth commission established by Chad's new President Idriss Déby to expose the venality of the previous Hissene Habré regime and to bolster the standing of the new government, while he relied on the same violent tactics and personnel during his rule (Snyder and Vinjamuri, 2003/4, p. 33). Yoweri Museveni's truth commission in Uganda, in 1986, similarly maintained the façade of liberal accountability in the service of legitimising an undemocratic regime (Quinn, 2004). Probably the most comprehensive attempts at transitional accountability ever have occurred in Rwanda and Ethiopia where there have been thousands of trials of genocidaires and the Derg respectively. In both countries, domestic trials were used as “a political tool in order to try to create a decisive breach with the past and the old political order,





concomitantly giving legitimacy to this new system of governance" (Tronvoll, 2009, p. 85). Both sets of domestic trials have been criticised for shortcomings in their human rights records, but the fault must lie far more in the failure of the majority Kagame and Zenawi regimes to undertake genuinely liberal transition than the inquiries, trials and TJ mechanisms (Longman, 2011, Pausewang, 2004). Though academics are content to consider these episodes within the canon of TJ even where they criticise them, in the interest of consistency and clarity perhaps the argument of De Brito et al (2001, p. 11) is more suited to reasoned appraisal of the merits and demerits of TJ generally:

"By 'transition' is meant the shift from a non-democratic regime type to a democratic one, not merely a change of government or a process of liberalisation within an authoritarian regime."

This is a useful definition to bear in mind in a new normative milieu where normalised and globalised TJ may confer a hollow legitimacy to the exercise of power. Compromised TJ in ostensibly democratic transitional regimes that retain autocratic features may testify to the precarious nature of their liberalisation, most notably Cambodia's hybrid Extraordinary Chambers and Indonesia's ad hoc tribunals, which have served in large part to shield their current ruling party and military, respectively, from accountability (McAuliffe, 2010; Cohen, 2003).

### III. THE PARADIGMATIC TRANSITION REVISITED

Unlike decolonisation or the radical metamorphosis of the French or Russian Revolutions, modern transitions are rarely revolutionary, in the sense of a substantial displacement in a short space of time of existing political and economic structures, or a psychology which imagines a novel culture whose traditions and history are largely being made anew (Schauer, 2003, p. 12). Societies can rarely completely remake themselves and there will be greater continuity than those at the vanguard of change would like – geography, language and ethnicity will usually remain constant, while the endurance of the peace versus stability debate testifies to the unlikelihood of entirely eradicating the previous regime or removing a defeated antagonist. In a transition, on the other hand, the state makes organisational, systemic changes in the functioning of the polity, but it is in many respects a more superficial process. The motivation for the change may not be the result of widespread rejection of the regime, but something altogether more desultory and shallow. For example, the Argentine Junta was prosecuted less because of the thousands of deaths in the internal Dirty War, but rather

because they lost the Falklands conflict (Zalaquett, 1992, p. 1428).

In many pacted transitions from authoritarian rule, it is possible to identify a key transitional moment such as the fall of the Berlin Wall, the resignation of Mubarak or the release of Mandela (Teitel, 1997, p. 2021; Mendez, 2007, p. 482). Given that positive change is an incremental process, one can point to more complex, multistage transitions like the fall of Salazar in Portugal or democratisation in Serbia, but there will be an identifiable tipping point where transition can be said to have become irreversible. Even if there is no 'big bang' at the start and the final point in democratic consolidation is years or even decades away (Ní Aoláin and Campbell, 2005, pp. 209 & 213). Transition after war will rarely subvert previous political arrangements even when the previous regime is defeated. Peace agreements, generally, do not outline in detail the precise form of institutional change required but merely pronounce the need for change and delineate the targeted institutions (Bell, 2000, p. 182). As Ní Aoláin and Campbell (2005, p. 182) put it, the paradigmatic transition "sees itself as a process of closure... There is typically a 'deal' followed by a period of constitutional and institutional change", at which point transition ends. These moments are "superficial legal ruptures," more in the nature of turning points in the nation's history where values are reconsidered and revised rather than complete transformation (Osiel, 1997, pp. 27 & 166).

Transition tends to be uniform throughout the state, a natural by-product of the uniformity of prior authoritarian rule or the national basis of peace agreements, and rarely attracts widespread resistance once necessary change in the political order begins (Ní Aoláin and Campbell, 2005, pp. 180 & 182). It should as a preliminary matter be clarified that the paradigmatic transition does not include transition to Isaiah Berlin's "liberal-minded despot[ism]" where the new regime may be "unjust... encourage the wildest inequalities, care little for order, or virtue, or knowledge" but leaves the citizenry "a wide area of liberty... or at least curb it less than other regimes." (Berlin, 1969, p. 129). De Greiff (2011, p. 23) is correct to argue that transitional redress instigated by this polity against its predecessor should be considered progress, but equally notes that it can easily be derailed. Even where it is not, even the most benign autocratic regime is too far removed from the normative foundations of peacebuilding in the UN Charter and the pillars of the modern international legal system, most notably in areas of human rights law, humanitarian law and criminal law, to constitute an environment conducive to productive interactions of TJ and rule of law reform (UN Secretary-General, 2004, para.9).

Falling short of revolution, transition can range from the radical to the conservative, and accountability measures here can have a significant effect on this transformation, for better or for worse. The paradigmatic, or genu-





ine, transitions by which the phenomenon of TJ should be judged are located on a sliding scale of democracy, from merely procedural to fully substantive, but at either end of the scale, justice initiatives will be of limited utility on a macro-level, even if there are beneficial, discreet micro-level projects. A Schumpeterian notion of transition to democracy, defined as one where "individuals acquire the power to decide by means of a competitive struggle for the people's vote", is a useful starting point (Schumpeter, 1950, p. 269). On the conservative end of the scale is a transition to a state meeting the minimum requirements of a procedural democracy based on majoritarian principles, but which lacks the substance of liberal democracy. It may not enjoy the consent of significant minorities, it may repress them, or have little commitment to the rule of law or to human rights. Osiel (1994, p. 44) argues against the 'fashionable' disparagement of the procedural republic, contending that it is significantly better than the fratricide which may have typified the preceding regime, but such a context is unlikely to yield a genuine, sustained effort to pursue TJ, rule of law reconstruction, reconciliation etc. For example, throughout the 1990s, the military asserted control over elected civilian governments in Guatemala, Haiti, El Salvador and the Philippines. Honduras became a democracy in 1982, but the military enjoyed effective control over policy for another decade (Leonard, 2010, pp. 156-166; Hayner, 2001, pp. 64-66).

In merely nominally democratic societies, the revanchist or illiberal forces can occupy a large realm of autonomous power and exert more power over the civilian government than the government over them. In such situations TJ is severely limited in any case, but such situations must be distinguished from cases such as Argentina or the Eastern Bloc republics, where the government is not immune from instability that accountability might occasion, but still retains functional authority. Though the previous regime will often attempt to maintain some power, situations where spoilers can destabilise a reasonably settled government must be distinguished from procedurally democratic regimes still effectively controlled by revanchist or undemocratic elements. In even the shakiest of transitions to liberal democracy, fruitful interaction of rule of law reconstruction, reconciliation and development with TJ (however limited) is possible if the government has at least a minimal commitment to these ends. The failure or success of TJ to complement, assist or even define the liberalisation process in such contexts is something it can fairly be judged on. On the other hand, TJ mechanisms should not be criticised for their lack of impact on democratisation, human rights or the rule of law at the other end of the transformative scale. In states like Rwanda, the DR Congo or Ethiopia, where victorious armies with little commitment to human rights take power (with or without electoral assent), Cambodia, where elections are rigged (St. John, 2005) or Indonesia, where the army retains significant influence (Schneier,

2009), the political climate is not conducive to the wider social legacy of trials or truth commissions.

Conscious of these limitations, TJ literature moved away from a Schumpeterian definition based primarily on elections, towards a broader normative idea incorporating liberal institutions and commitments, most notably the rule of law (Teitel, 2000, p. 5). The ideal transitional democracy is a liberal, fully constitutional polity where governments are elected by a majority and with a rule of law that serves to protect minorities, but, arguably, the only instances of such a transition in a single jump are East Germany's subsumption into the German Federal Republic and Northern Ireland's enduring existence within the UK. TJ and rule of law reconstruction can usefully be integrated in such conditions, but the macro-level contribution of this interaction will rarely determine the success of transition as it might in some weaker states, for the simple reason that the state already delivers human rights, democracy and rule of law. In the former category of cases, positive reform can successfully proceed independently of TJ and vice-versa.

Transitions like those in East Germany and Northern Ireland are hardly typical. A more representative transition is one to a state which rules with the consent of the people through free and fair elections, with a monopoly on the use of legitimate force and a commitment to human rights. This is where TJ might have a significant bearing on the success or failure of political reform and rule of law transformation, even if this democracy falls some way short of popular engagement with politics, is not fully free of terrorism or violence and even if the commitment to human rights lacks full compliance by all public and private actors. Though limited, this type of democracy goes beyond what Bhargava (2000) labels "minimally decent" societies which merely avoid relapse into past atrocities. Semi-stable democratic transitions like those in Bosnia, East Timor, South Africa, Tunisia and Cote d'Ivoire obviously fit within this schema. However, as Bell (2009, p. 25) reminds us, transition is not the same as post-conflict, but merely constitutes a post-settlement phase where violence is translated into a set of political and legal holding devices that enable old disputes to take place less violently. It is always somewhat precarious – even the clearest transitional political arrangements and mechanisms will not automatically bring peace, security or end human rights violations; passionate disagreement over politics may exist even within democratic institutions. As the UN Rule of Law and Transitional Justice Report puts it:

"And yet, helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatised and divided population, is a daunting, often overwhelming, task. It requires attention to



myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security." (UN Secretary-General, 2004, para.3).

Even countries labelled "post-conflict" manifest great insecurity and volatility, while problems will also persist in authoritarian handovers to liberal opposition. Carothers (2002, p. 17-18) even advocates the removal of the "transition lens" in such contexts, arguing that it does more to confuse analysis of policy than to clarify it, by presuming a democratic outcome. He argues that those interested in democratisation:

"should start by assuming that what is often thought of as an uneasy, precarious middle ground between full-fledged democracy and outright dictatorship is actually the most common political condition today of the countries in the developing world and the post-communist world. It is not an exceptional category... it is a state of normality for many societies"

Nevertheless, rule of law reformers and TJ actors are justified in being more ambitious than Carothers in believing their activities can make a firm contribution to moving beyond the circumstances. As such, the potential of TJ to effect or catalyse positive change is best judged in relatively shaky transitions in countries such as Cote d'Ivoire and Iraq, despite their persistent insecurity. Success or failure in such circumstances will say much for transition justice's liberalising and rule of law-affirming potential, because the political context in which they operate does not make their accomplishment or frustration foregone conclusions. By comparison, TJ mechanisms may be applied in situations where any potentially positive legacy will be so overshadowed by political instability as to be of limited utility. Notable examples include states which move to democracy and undertake TJ but remain embroiled in war, such as Sri Lanka after the Kumaratunga election in 1994 (Sriram, 2002), or the complicit mass human rights abuses that took place in Indonesia in Aceh and West Papua (International Center for Transitional Justice & KontraS, 2011).

## CONCLUSION

The tendency to include TJ mechanisms employed in long-consolidated or deeply unstable/authoritarian states under the rubric of TJ obscures its value in achieving various macro-aspirations (peace, democracy, human rights, development, rule of law) and the micro-goals which contribute to them (retribution, deterrence, reconciliation, social pedagogy).

In the proposed situations, the mechanisms are almost irrelevant due to pre-existing conditions favourable to positive outcomes, or ongoing war or the balance of illiberal power are too inimical to their success. When evaluating TJ as a general phenomenon, both its advocates and detractors draw the most relevant conclusions primarily from the paradigmatic transition from authoritarianism or war to democracy because it is here that it has the greatest potential and is most needed to catalyse change. Unlike TJ in mature democracies or civil-civil transitions, transitional politics is open-ended in a way that steady-state politics is not. As DuBois and Czarnota (1999, p. 9) put it:

"Whereas ordinary politics, even ordinary politics about politics, takes place in accordance with the 'rules of the game' which inevitably foreclose certain outcomes, transitional politics, in seeking to fundamentally change the rules of the game, is subject to no such limitations".

In contrast to TJ in authoritarian regimes or in ongoing conflicts, measures of accountability can proceed and effect change without the very real possibility of being undermined by arbitrary authoritarian whim or reversal on the battlefield. In the paradigmatic transition, the possibility for the army or previous regime to do this is severely weakened (Mendez, 1997, p. 11). This potential may be limited, contingent as it is on numerous conditions such as political will, funding and international support. Indeed, the history of TJ is blotched by the failure to realise the claims of its greatest advocates. However, a return to evaluating TJ mechanisms primarily on the basis of how they work in situations where they can genuinely affect political settlement for good or ill is a necessary step if we are to credibly assess their value in situations where resources are limited, foreign aid stretched and socio-political arrangements under strain. TJ has a number of convenient fictions – that it can 'heal' those who have suffered rape and torture, that it can generate a publicly acceptable record of past abuse, that it can deter the savagery of war – but none is more convenient than labelling non-transitional circumstances as transitional to advocate or criticise the phenomenon. A back-to-basics focus on the paradigmatic transitions is the clearest way for domestic governments and international donors to assess the very open question of whether the ever-increasing plethora of TJ mechanisms are the "centrepiece of democratic transition" (Orentlicher, 2007, p. 15) or constitute a "costly luxury" (Mani, 2008, p. 253). Humanitarian projects that deal with past violence in undemocratic states and consolidated democracies are of course to be welcomed, but considering these actions as 'transitional' justice serves only to muddy the debate. A necessary step is to distinguish between TJ on the one hand and the application of the mechanisms traditionally associated with it on the other. ■



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